

Order

Michigan Supreme Court
Lansing, Michigan

June 30, 2009

Marilyn Kelly,
Chief Justice

ADM File No. 2009-11

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

Proposed Amendment of
Rules 6.302 of the
Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendment of Rule 6.302 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A)-(B) [Unchanged.]

(C) A Voluntary Plea.

- (1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement. All discussions regarding a defendant's plea must take place in open court and be placed on the record.
- (2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.
- (3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may

- (a) reject the agreement; or
- (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or
- (c) accept the agreement without having considered the presentence report; or
- (d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement.

(4) [Unchanged.]

(D)-(F) [Unchanged.]

YOUNG, J. (*concurring in part and dissenting in part*). I concur in the order publishing for comment a proposal that would require that plea discussions occur on the record and in public. However, I dissent from the majority's decision to decline to publish for comment a proposal that would eliminate a defendant's right to withdraw a knowingly, voluntarily, and intelligently tendered guilty plea when a sentencing judge declines to follow a prosecutor's *nonbinding* sentencing *recommendation*. I would welcome the opinion of the bench and bar on this proposal rather than the majority's decision to shelve the proposal without further debate or input.

Our current court rule, MCR 6.310(B)(2)(a), states that when a defendant pleads guilty in exchange for a nonbinding prosecutorial sentencing recommendation, the defendant is *entitled* to withdraw the guilty plea whenever a judge declines to follow the prosecutor's suggestion. This court rule is premised upon *People v Killebrew*, 416 Mich 189 (1982). However, the *Killebrew* rationale categorically prohibited the court from "participat[ing] in discussions aimed at reaching a plea agreement." *Id.*, 205.

People v Cobbs, 443 Mich 276, (1993), decided eleven years later, explicitly sanctioned judicial participation in formulating a sentencing agreement and undermined the foundational underpinnings of *Killebrew*. In a *Cobbs* plea, when the court is a participant in the plea agreement, the principles permitting withdrawal of a guilty plea simply have no applicability to a *Killebrew* plea. MCR 6.310(B)(2)(a) essentially binds a

judge to a sentencing agreement that the judge was not party to and to which he did not acquiesce. Otherwise, the defendant gets to withdraw his guilty plea and to begin the process all over again.

Where a defendant has obtained the full benefit of the bargain struck with the prosecutor—a *nonbinding* sentencing *recommendation*—there is no logical reason to permit a defendant to rescind his knowing, voluntary, and intelligent guilty plea when a court is unwilling to abide by the prosecutor’s recommendation.

I would publish the complete proposal for comment, as attached, and favor amending MCR 6.302(C)(3) and MCR 6.310(B)(2)(a).

CORRIGAN, J., concurs with YOUNG, J.

Staff Comment: The proposed amendment of MCR 6.302 would require all discussions regarding a defendant’s plea agreement to occur in open and on the record to reduce the possibility that a defendant would be coerced into agreeing to a particular sentence.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-11. Your comments and the comments of others will be posted at the following address: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

APPENDIX A

ADM File No. 2009-11

Proposed Amendment of
Rules 6.302 and 6.310 of
the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.302 and 6.310 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the

proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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(A)-(B) [Unchanged.]

(C) A Voluntary Plea.

- (1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement. All discussions regarding a defendant's plea must take place in open court and be placed on the record.
- (2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.
- (3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may
 - (a) reject the agreement; or
 - (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to ~~or recommended by the prosecutor~~; or
 - (c) accept the agreement without having considered the presentence report; or
 - (d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to

follow the sentence dispositionit, the defendant will be allowed to withdraw from the plea agreement. A judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea.

(4) [Unchanged.]

(D)-(F) [Unchanged.]

Rule 6.310 Withdrawal or Vacation of Plea

(A) [Unchanged.]

(B) Withdrawal After Acceptance but Before Sentence. After acceptance but before sentence,

(1) [Unchanged.]

(2) the defendant is entitled to withdraw the plea if

- (a) ~~the plea involves a prosecutorial sentence recommendation or an~~ agreement for a specific sentence, and the court states that it is unable to follow the agreement ~~or recommendation~~; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or
- (b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.302 would require all discussions regarding a defendant's plea agreement to occur in open and on the record to reduce the possibility that a defendant would be coerced into agreeing to a particular sentence. Further, the proposal would eliminate language in MCR 6.302 and MCR 6.310

that allows a defendant to withdraw a guilty plea if a prosecutor agrees to recommend a sentence but the judge refuses to sentence as recommended by the prosecutor.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by XXXXX, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-11. Your comments and the comments of others will be posted at the following address: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 30, 2009

Corbin R. Davis

Clerk